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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MYRA H., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	No. B179908 (Super. Ct. No. CK54852)

ORIGINAL PROCEEDING; petition for an extraordinary writ, Stephen Marpet, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Denied.

Murray S. Berns for Petitioner.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and William D. Thetford, Senior Deputy County Counsel, for Real Party in Interest.

No appearance for Respondent.

A mother petitions for writ relief from a dependency court order finding that she is not entitled to family reunification services and setting the matter for a permanent plan hearing.[1] (Welf. & Inst. Code, §§ 361.5, subd. (b)(5), 366.26; Cal. Rules of Court, rule 39.1B.)[2] We deny the petition.

FACTS

Rudy G. (born in December 2003) spent the first month of his life in intensive care with pneumonia. When he was released to his mother, Myra H., she took him to the doctor once, and was told to return within a week, but she did not do so. On March 5, 2004, when Myra returned to the doctor for Rudy's vaccinations, Rudy was referred to emergency and admitted to the hospital because he was failing to thrive. He was also found to be suffering from multiple fractures to his legs, arms, and ribs at various stages of healing. The attending physician attributed Rudy's condition to physical abuse and severe neglect, finding "there [was] no other explanation." A "hospital hold" was placed on Rudy and his three-year-old sister, Unique G., was detained and placed in foster care.

On March 10, the Department of Children and Family Services filed a petition alleging the serious physical harm and severe physical abuse to Rudy, cruelty, failure to protect by the parents (who had a history of methamphetamine use), and risk of harm to Unique. (§ 300, subds. (a), (b), (e), (i), (j).) The petition gave notice that the Department might seek an order that

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[1] The court's order affected both parents, but only the mother is before us on this writ petition.

[2] Undesignated section references are to the Welfare and Institutions Code.

no reunification services be provided. (§ 361.5.) The Department reported that there had been two prior referrals involving Unique, both stemming from the parents' drug use. The court found a prima facie case for detention, and ordered reunification services, monitored visitation, and investigation for relative placement.

In April, the Department reported that the parents had been living together (and apart from other family) for the previous two and a half years. The father worked 10- to 12-hour days with his family's extermination business, and Myra was the children's primary caretaker. Myra attributed Rudy's failure to thrive to intestinal problems and problems with various formulas, which kept him from gaining weight, but offered no explanation for Rudy's fractures, and said he must have "some undiscovered medical condition." The father said Rudy was colicky and cried a lot, but he personally did nothing to Rudy. He said Myra "yells a lot" and yells at Unique, but he did not think she would hurt Rudy. Both parents claimed to have been off drugs for several years, but family members said Myra was still using and test results showed the father was as well. Although ordered by the court to test on an ongoing basis, the parents had not yet begun to do so, and there was very little interaction when they visited Rudy. Meanwhile, Rudy's foster mother reported that he was gaining weight, developing normally, "happy and content," and did not cry as a colicky baby would, which was inconsistent with Myra's reports. On April 15, the court ordered both children placed with their maternal grandmother and requested follow-up medical reports.

On April 30, the Department reported that Myra had been charged in 1998 with grand theft and in March 2004 with driving with a suspended license,

and the father had 1993 charges for possession of narcotics and being under the influence of a controlled substance. A bone survey on Unique revealed no evidence of fractures. A bone survey on Rudy revealed normal bones and bone growth, but there were old fractures on his leg, arms, and multiple ribs, which in the opinion of experts were the result of more than one episode of abuse (which would have included pulling his legs, compressing or twisting his arms, and shaking him), not congenital bone problems. By age five months, Rudy was interacting socially, developing normally, and actually thriving in his grandmother's home. The court ordered as frequent monitored visitation for the parents as could be worked out with the grandmother.

Mediation efforts were unsuccessful, and a trial date was set. On June 29, the social worker reported that Myra had had nine negative drug tests and missed one (on April 8), and that she had apparently enrolled in drug counseling, but was terminated for lack of attendance. She had not enrolled in individual counseling. She was employed, and regularly visited the children in the evening.

On August 5, the Department reported that Myra had not complied with its recommendation that she attend a parenting program and drug counseling, but she was testing negative for drugs. The Department recommended no reunification services. The court, in turn, sustained the petition as amended (§ 300, subds. (a), (b), (e), (j)), and ordered an Evidence Code section 730 evaluation (by a clinical psychologist, Frank J. Trankina, Ph.D.) to address issues of bonding, visitation, and reunification, and the possible benefits of counseling for the parents to address physical abuse issues.

On September 1, the Department reported minimal compliance by Myra with the Department's recommendations. She had submitted to random drug testing, which showed she was not using, but she had not shown proof of enrollment in either drug counseling or a parenting program. Myra had the children visiting three times a week in her home. The Department continued to recommend no reunification services.

On November 18, the Department reported that Myra was uncooperative and failed to provide information concerning her progress, but that the National Council on Alcoholism and Drug Dependency (NCADD) reported that Myra had enrolled in a parenting program on April 5, 2004, was terminated on May 21 for excessive absences, was reinstated on June 28, was again excused for excessive absences, and re-enrolled on July 28. On August 20, Myra had enrolled in individual counseling, attended three sessions, missed four sessions, and was terminated on October 14. Since April, Myra had been called for drug testing 13 times, and missed 4 tests. She denied current drug use. Both parents were visiting the children on a regular basis and had a "relationship" with them.

Dr. Trankina made his report based on what he conceded were inadequate records, observation of the children in the home of the grandmother, observation of the parents' interactions with the children, and interviews with the parents. He found Myra did not present with a pattern of detachment typical of an abuser, and said it "would seem most unlikely that the mother would actively and intentionally abuse the children." Both parents had "positive bonding" with both children, both of whom appeared healthy and sociable and to be developing age-appropriately. Dr. Trankina felt the parents regarded the children's detention "with [a] due degree of seriousness," and he

considered it "unlikely that any detrimental patterns would be repeated." He said the parents had a "positive attitude toward counseling," concluded that the children were "no longer at risk for abuse" and that successful reunification was possible, and recommended six more months of treatment, unmonitored visits, and a 60-day extended home visit.

The Department continued to recommend against reunification services. It disagreed with Dr. Trankina's conclusions that the children were no longer at risk for abuse by their parents and disagreed that the parents should have unmonitored visits. The Department pointed out that the parents had shown minimal compliance and an unwillingness to cooperate in providing accurate information (Myra stated she would provide documentation to her attorney rather than the Department), which made it difficult to assess the potential danger to the children if returned to the home.

On December 9, the Department reported that it had received verification from NCADD that Myra (and the father) had completed a 12-session parenting program. In addition, Myra had completed five sessions of a twelve-session program of individual counseling (and the father had completed nine). According to the NCADD documents, the parents had made reunification a priority.[3] (The father never drug tested, continued to live with Myra, and continued to deny Rudy's injuries, saying "all this is a joke.") While acknowledging recent compliance with the case plan, the Department

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[3] With regard to Myra, the counselor stated that "Myra ha[d] been attending her individual counseling sessions with a great attitude. She appear[ed] to be focused on maintaining a quality life for herself, enjoy[ed] her new job, and ha[d] made reunification with her children a priority."

continued to recommend against reunification services, citing the parents' reluctance to comply and their continued resistance in providing correct information to the Department.

A contested hearing was held on December 9. The court considered recent reports, testimony from the Department's investigator who had been on the case nearly since the beginning, and the testimony of Myra, confirming her employment, recent participation in parenting, individual counseling, and drug testing, and the strong bond she and the father had with the children. She visited the children two or three times a week, and cooked, fed, and bathed them in the monitored setting. She said the children are her "life." Counsel for the parents and the minors argued for reunification services. The court noted the "very unique position" it was in by being able to see how the parents attempted to reunify and comply with a case plan over nine months before deciding whether to make an order for services. The court conceded the "strong bond" the parents had with the children, but found the parents' efforts were inadequate, and found no competent evidence that further abuse or continued neglect was not likely. The court denied reunification services pursuant to section 361.5, subdivision (b)(5), and set the matter for a permanent plan hearing. (§ 366.26.) Myra petitions for relief.

DISCUSSION

Myra contends (1) there was insufficient evidence to support the court's order for no reunification services pursuant to subdivision (b)(6) of section 361.5, and (2) the court erred in not making proper findings pursuant to section 361.5, subdivision (h), which Myra says is required if services are denied pursuant to

subdivision (b)(6) of section 361.5. Neither argument has merit since Myra's underlying premise is wrong -- the dependency court's order denying services was not based on subdivision (b)(6), but was instead based on subdivision (b)(5).

The court's order is supported by substantial evidence. (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.) Section 361.5, subdivision (b)(5), provides that "[r]eunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence . . . [t]hat the child was brought within the jurisdiction of the court under subdivision (e) of section 300 because of the conduct of that parent . . . ." Here, an allegation under section 300, subdivision (e), was made and sustained against Myra (a finding Myra does not contest), which makes subdivision (b) of section 361.5 applicable here.

Where, as here, a court finds by clear and convincing evidence that a child is as described by section 361.5, subdivision (b), the general rule favoring services no longer applies and is "replaced by a legislative assumption that offering services would be an unwise use of governmental resources." (*Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 164.) At that point, a court may *not* offer services "unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent. . . . [¶] The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, . . . are among the factors indicating that reunification services are unlikely to be successful." (§ 361.5, subd. (c).)

The record shows the dependency court was well aware of the applicable standards and factors it was to consider in determining whether to grant services. While the court noted the "strong bond" between Myra and her children, the total picture before the court included the injuries to Rudy and the seriousness of the injuries, and Myra's efforts over nine months to comply with the recommended case plan. The court was unimpressed with Myra's efforts and with the fact that she had only just completed parenting, drug tested inconsistently, and had only recently begun individual therapy where she might have addressed abuse issues. For these reasons, the court determined there was insufficient competent evidence before it to suggest that more services would likely prevent reabuse or continued neglect. While Dr. Trankina opined otherwise, the trial court was entitled to weigh that evidence in light of everything else in the record, and clearly it did not give the doctor's report much weight (the doctor himself pointed out the inadequacies with the report). (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) The issue is not whether we might have ruled otherwise, but whether substantial evidence supports the decision made by the dependency court. It does.

DISPOSITION

The petition is denied.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

SUZUKAWA, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.